Supreme Court, U.S.
FILED

981560 DEC 10 1998

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

BRIAN A. DROSTE,

Petitioner.

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances can an agent of the government acting under the color office make a seizure which is unlawful, completely outside the agent's limited grant of authority to act as a police/law enforcement officer, or citizen and said seizure still be "reasonable" in the context of the Fourth and Fourteenth Amendments to the United States Constitution?

2. Can a citizen use all reasonable force, including deadly force, to resist any unlawful arrest?

3. Where a state legislature has enacted comprehensive, clear and unambiguous statutes delineating and limiting police powers and an agent of the state makes a seizure of a citizen which is clearly illegal and beyond his legislative authority is the agent merely violating a statute without any constitutional provisions being implicated?

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OPINIONS BELOW

The decision of the Franklin County Municipal Court denying Petitioners Motion to Suppress Evidence was filed on July 26, 1996, in Case No. M9602TFC-107628, is unreported and is reproduced as Appendix A.

The opinion and Judgment Entry of the Court of Appeals of Ohio, Tenth Appellate District reversing the trial court on the denial of the Motion to Suppress Evidence, filed April 1, 1997, in Case No. 96-APC07-906 is unreported and is reproduced. Appendix B.

The opinion of the Ohio Supreme Court reversing the Appellate Court finding as did both the lower Courts, that the agents who instigated the seizure had no authority to do so. However, no constitutional rights were violated and the evidence should not be suppressed. Opinion filed August 19, 1998 Case No. 97-998, is not yet officially reported and is reproduced as appendix C.

JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was filed on August 19,1998. Petitioner's Application for Extension to File Writ of Certiorari pursuant to United States Supreme Court Rule 20.1 was granted on October 12, 1998 extending the time to file this petition on or before December 10, 1998. Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Tenth Amendment, Fourteenth Amendments, United States Constitution:

U.S. Const. Amend. 4

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const.. Amend. 10

The powers not delegated to the United States in the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. 14

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within it's jurisdiction on the equal protection of the laws.

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STATEMENT OF THE CASE AND OF THE FACTS

During the evening hours of February 26, 1996, the operator of a motor vehicle later identified as Petitioner, Brian A. Droste, was chased southbound on State Route 315 within the city of Columbus by two liquor control investigators, Mr. Betts and Mr. Williams. The agents allege that Petitioner was driving at a high rate of speed and changing lanes without signaling. The vehicle driven by liquor control investigators ("Agents") had no markings that would suggest the occupants were involved in law enforcement, nor did the vehicle have beacons or a siren. Agent Betts notified a dispatcher of the incident via the Emergency Radio Network ("LEERN") and was advised that a police officer was being dispatched to the area. The agents followed the vehicle until it exited the freeway and stopped for a traffic light.

The agents then initiated a traffic stop and seizure of Petitioner.

Agent Betts testified that when he and his partner, who were not in uniform approached Petitioner's stopped motor vehicle they identified themselves as "police officers", not liquor agents (TR 8) and requested the four occupants to place their hands in plain view. When the order was not complied with, Agent Betts again identified himself as a "police officer" and ordered the driver of the vehicle to state his name and give proper identification (TR 8) Agents Betts, who had a gun in a holster on his right hip, removed Petitioner from the car. (TR 21) Mr. Droste was told to place his hands on the vehicle and spread his legs so that he could be patted down for weapons or contraband. (TR 23) Appellee was given a Miranda warning by Agent Betts who questioned Petitioner about his age and whether he had consumed alcohol. (TR 8) When Petitioner admitted to

drinking, he was arrested by Agent Betts for underage consumption. (TR 9)

A few minutes after the traffic stop by the agents, Columbus Police Officer Lagore arrived on the scene and observed that Petitioner was handcuffed outside of the agent's unmarked vehicle. (TR 34) It was decided that the Petitioner should perform field sobriety tests. According to Officer Lagore, Agent Williams was new on the job and he requested to give the field sobriety tests in order to practice.

After arrest Petitioner was read BMV Form 2255, which concerns the administrative license suspension and the consequences of refusing to submit to a chemical test to determine blood alcohol content. Agent Betts admitted that he signed the form as the arresting officer, but denied filling it out, stating that it was done by Officer Lagore. (TR 12-13) Officer Lagore testified that all of the handwriting on the form was done by the liquor agents, who also explained the form to Appellee. (TR 37-38) Officer Lagore also

acknowledged completing three uniform traffic citations all of which indicated that Petitioner had not caused or almost caused a traffic accident based upon information reported to him by the agents. (TR 36-37)

On June 26, 1996 the Franklin County, Ohio Municipal Court overruled Petitioner's Motion to Suppress evidence, ruling that the unlawful seizure by officer's (liquor agents) acting completely outside of any statutory authority to act as peace officers did not violate any constitutional protections therefore suppression of evidence resulting from said seizure was not authorized. Petitioner entered a plea of No Contest and timely perfected an appeal.

On April 1, 1997 the court of Appeals of Ohio, Tenth Appellate District reversed the trial court holding that the liqour agents had no authority to act as "police officers" to effect an arrest for a traffic violation (reckless operation) and said agents had no reasonable suspicion to believe that Petitioner was committing an offense that was within their

limited authority to act as "police officers." Therefore, the agents seizure/detention was unlawful, not supported by probable cause to make a lawful arrest and violated the Fourth and Fourteenth Amendments of the United States Constitution thereby requiring the application of the exclusionary rule.

The Ohio Supreme Court reviewed the case upon allowance of request for a discretionary appeal filed by Respondent. On August 8, 1998 the Ohio Supreme Court reversed the judgement of the Court of Appeals, suppressing the evidence resulting from the agents unlawful detention. The Ohio Supreme Court agreed with the Court of Appeals holding that the agents actions were completely outside of their limited statutory authority to act as police officers. However, The Ohio Supreme Court held that the exclusionary rule should not be applied. The cornerstone of the Courts ruling is that where an agent of the state with limited statutory authority to act as a police officer effects a

detention or arrest of a citizen, which is completely outside of the agents authority to do so, such action's are merely violations of a statute. Based on the foregoing rationale the Court found that the protections of the Fourth and Fourteenth Amendments were of no import in the instant case.

Petitioner is requesting review by this Honorable Court as setforth in the Jurisdiction Statement.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Ohio Supreme Court's decision below invites and in some instances may actually encourage (A) illegal actions by state agents; and (B) lawful physical confrontations and armed conflict between state or federal agents and citizens who may be basically law abiding.

More illogically it permits dangerous criminals to use force to prevent detection of evidence of serious crimes by condoning unlawful seizures which they can lawfully resist.

It is not uncommon that armed conflicts occur when a state agent attempts to make a seizure for a relatively minor traffic violation and the subject fears that submitting to such seizure may result in the detection of evidence of serious criminal activity or simply an outstanding warrant for his arrest. The suspect elects to flee, resist or shoot first and ask questions later. Pursuant to the decision below, if the agents actions were unlawful the suspect, probably unknowingly, is

justified in taking such action.

Should this Honorable Court decline to review a decision rendered by the highest Court in the State of Ohio which encourages criminals to lawfully suppress (prevent detection of) evidence with the legal semi-automatic weapons and hollow point bullets?

The above is only one of the illogical conundrums created by the decision below.

Admittedly the instant case did not involve any use of firearms or even minor force by Mr. Droste. Were the stakes not so grave one might consider it ironic that the generally law abiding citizen, such as Mr. Droste, is most likely to submit to state agent unlawfully brandishing his authority, while those with less respect for such authority and more criminally disposed are most likely to challenge said, whether they happen to know they have the lawful right to do so or not.

Police officers and other state agents have previously

been given contradictory mandates by lower appellate courts in Ohio regarding extra jurisdictional seizures. (See Appendix D). Ohio State Supreme Court decisions are printed and distributed weekly to all Ohio State Bar Association members. Therefore, state agents are certain to become aware that, pursuant to the decision below, extra jurisdictional seizures albeit unlawful will not result in invalidation of any arrest or the suppression of evidence.

Violent criminals and some of the zealous members of rapidly growing antigovernment groups such as "unofficial militias," "Freemen," "common-law," separatists and others when faced with a imminent seizure or intrusion by a government agent may not engage in the thoughtful assessment of whether such action is unconstitutional or merely unlawful. If a blood bath ensues their legal counsel would be ethically bound to contest any charges which may arise as a result of the lawful use of force to resist an unlawful seizure.

Petitioner submits that through review of the legal issues underlying the decision below as briefly outlined herein will undoubtedly fill the illogical void created by the Ohio Supreme Courts decision. It should also be noted that as demonstrated herein said decision is contrary to virtually all authoritative legal treatises addressing this issue as well as every reported decision from other jurisdictions. Finally Petitioner submits that said decision is in conflict with clearly established principals of law previously decided by this Honorable Court.

While the Ohio Supreme Court omitted any meaningful discussion of the issue it is clear that the actions of the liquor agents constituted a seizure under the Fourth Amendment. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 892 U.S. 116 (1968). "A person may not be detained even momentarily" without contravening the Fourth Amendment.

Florida v. Royer, 460 U.S. 491, 498 (1963).

Petitioner will not unnecessarily restate the portions of the transcript referred to in the Statement of the Case and Facts nor the lower courts findings setforth infra and in the attached appendix.

It is clear that Petitioner was seized. Any "reasonable person would have believed he was not a free to leave" *Royer*, supra, at 502.

It is also undisputed that the agents were purportedly acting as agents of the state, but in fact said seizure was completely outside of the limited grant of authority which the legislature in Ohio has vested state liquor agents with "police powers, eg. the powers to enforce laws and effect seizures and arrests pursuant thereto.

Having established the above, the crucial issue in this matter is finally ready to be addressed, although the Ohio

Supreme Court certainly did not do so in any meaningful manner.

The respondent in this matter did, however, recognize the primary issue. The State in it's Motion to Certify Conflict filed in the Appellate Court framed the sole issues as follows:

> Where an agent of the state acts entirely outside his or her statutory authority in searching, detaining, or seizing an individual, does the fact that the act was beyond a statutory grant of authority mean that any evidence obtained....must be suppressed? (Appendix D)

While the Petitioner does not contend there is necessarily a bright line rule that would govern all circumstances encompassed in the above question, clearly review thereof in the context of the constitutional frame work of the delineation and delegation of "Police powers" is crucial to answer the question in it's broadest form.

Legal scholars, authoritative treatises and courts throughout the land have answered the Respondent's

question thusly, as a general rule "an arrest based upon evidence obtained by the unlawful assertion of authority is...illegal; and any fruits of that arrest must be suppressed." *State v. Phoenix*, 428 So. 2d 262 [annotated in 34 A.L.R. 4th 328, see also note 8.therein citing Am. Jur. 2d., Arrests Section 50].

Whatever it may be, a state's agent's exercise of police powers without a grant of authority is not a mere violation of a statute.

Police powers of the individual status are conferred upon said states by the Tenth Amendment of the United States Constitution (see police power, Blacks Law dictionary page 801, 6th Ed., 1991).

However, the state's grant of police powers clearly must be consistent with the rights and privileges granted all citizens by the provisions and amendments to the United States Constitution. "Those powers not delegated to the United States in the Constitution, nor prohibited by it to the

States,are reserved to the States respectively, or to the people." (U.S. Constitution, Tenth Amendment)

Clearly a law enforcement officer who is not properly exercising the police powers delegated to him or her by an individual state pursuant to the State's authority to do so under the Tenth Amendment is acting outside of any authority granted to the State. Therefore such actions are well beyondand in derogation of any constitutional authority, to exercise such powers.

In Ohio it is the authority and function of the legislature to pass laws which make certain acts unlawful. Similarly it is within the sole province of the legislature to confer upon individuals police powers and authority to enforce such laws. As a necessary corollary the legislature may divest such individuals of their authority to act as law officers. By setting forth the scope of the authority of an agent or officer of the law, the legislature has clearly divested such individuals of the authority and/or status of an

agent or officer of the law where he or she seeks to assert authority not granted by the legislature.

The legislature has specifically provided a comprehensive delineation of individuals who are granted the status of police officer, law enforcement officer or similar status and the circumstances under which such individuals may act as police officers or law enforcement officers.

While an ordinary citizen can, under certain circumstances, make an arrest, these circumstances are very limited. See O.R.C. 2935.04.

O.R.C. 2901.01A(11) confers the status of law enforcement officer upon designated individuals. 2901.01A(11)(b) provides in pertinent part that a "law enforcement officer" is:

> An officer, agent, or employee of the state or any of it's agencies, instrumentality's, or principal subdivisions, upon whom, by statute, a duty to conserve peace or enforce all or certain laws imposed and the authority

> to arrest violators is conferred, within the limits of that statutory duty and authority. (emphasis added)

O.R.C. 5502.61(c) confers upon liquor investigators the authority to arrest individuals for certain specified violations. Respondent and all the courts below agree that the agents were not acting within the scope of their authority.

The logical anomalies resulting from the decision below are not limited to situations involving liquor control agents. The Ohio Revised Code confers the designation "law enforcement officer" or "police officer" upon more than thirty (30) categories of individuals O.R.C. Sections 2901.01(A)(11) and 2935.01(B) respectively. Such designations include, but are not limited to, a mayor acting in the capacity of chief conservator of the peace within the mayors municipality; a member of the organized militia of this state or the armed forces of the United States; a prosecutor or assistant prosecutor; a veterans home police officer; a regional transit authority police officer; a

metropolitan housing authority police officer, and a food stamp trafficking agent. Additionally other individuals are granted such status through other statutes; e.g. the Attorney General and investigations appointed by the Attorney General, (See O.R.C. 109.51)

The legislature has not seen fit and has clearly manifested it's intention not to provide each of these special officers statewide subject matter and territorial jurisdiction. However, pursuant to the decision below each of the agents can make an unlawful but constitutionally valid seizure.

The potential blood bath portrayed by Petitioner at the outset is not illusory or mere hyperbole.

Some members of the vast number of agents with limited police powers are going to act or zealously and unlawfully and at least one of them is going to be legally executed by a citizen.

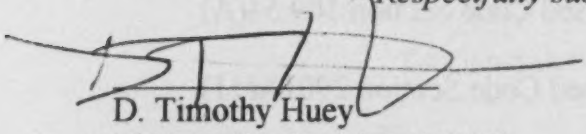
Petitioner submits that guidance form this Honorable Court on the issues setforth herein is urgently needed. Blood

need not be shed nor citizen's rights violated by quasi police before the logical and legal infirmities of the decision below are subject to thoughtful scrutiny.

CONCLUSION

Wherefore, for the above reasons, certiorari should be granted.

Respectfully submitted,



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March 26, 1999

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IN THE MUNICIPAL COURT OF FRANKLIN COUNTY
COLUMBUS, OHIO

STATE OF OHIO,

CITY OF COLUMBUS,

Plaintiff,

Case No. M9602TFC107628

V.

BRIAN A. DROSTE,

Defendant.

Judge Janet E. Jackson

DECISION

This cause came before the court on Defendant's motions to suppress evidence and dismiss. The facts are as follows: On February 26, 1996 at approximately midnight, Defendant was operating his

vehicle on State Route 315 within the City of Columbus at excessive speeds, approaching at times 90-100 m.p.h. Defendant was traveling from the center lane to the left lane, abruptly braking to avoid collision with other vehicles. Defendant did not signal when changing lanes.

Defendant's driving was observed by two liquor control investigators from the Department of Public Safety-' Liquor Enforcement Division, Michael Betts and Philip Williams who were on duty. The investigators notified the Law Enforcement Emergency Radio Network (LEERN) of what they were observing and asked for a marked cruiser to respond. The Ohio State Highway Patrol responded

to the call and asked the investigators to report their location so a cruiser could respond. The Defendant's vehicle exited S.R. 315 at Lane Avenue and stopped at the traffic light at the end of the exit ramp. The investigators continued to follow Defendant's vehicle. The investigators were advised by LEERN to stop the vehicle and that a marked cruiser was on route to their location.

The investigators proceeded to make the traffic stop. They identified themselves as liquor investigators and displayed their badges. They asked Defendant to exit the vehicle. At that time, the investigators noticed a strong odor of alcohol about Defendant's person. Officer Betts asked defendant's

name and age and determined that Defendant was under 21 years of age. About five minutes after the stop, Columbus Police Officer Lagore arrived at the sc4 Officer Lagore had no contact with the investigators before his arrival at the scene. Any information was supplied to him by the police dispatcher.

Officer Lagore had some discussion with the liquor investigators who explained how they came to stop defendant, and based upon those discussions, it was determined that Defendant would be asked to submit to field sobriety tests.

Agent Williams indicated to Officer Lagore that he wanted to administer the field sobriety tests for experience so Officer Lagore let him administer the tests. The tests were conducted properly by Agent Williams and Officer Lagore observed Defendant's failing performance.

Thereafter, Officer Lagore arrested Defendant for OMVI and transported him downtown for a breathalyser test. Agent Betts performed the duties of affl?M arresting officer as outlined in R.C. 4511.191. Defendant agreed to submit to the chemical test with a .14 result on the breathalyser. Defendant was charged by Officer Lagore with two counts of OMVI and reckless operation.

Agent Betts charged defendant with underage consumption of alcohol based upon his observations of Defendant and information about Defendant's age obtained during Defendant's detention. Defendant submits that the investigators lacked the statutory authority to make an arrest for the traffic offenses and the evidence obtained as a result of the illegal arrest would be suppressed. As a threshold matter, the court is not persuaded that the liquor investigators actually arrested Defendant for O.M.V.I. The court finds that Defendant was placed under arrest for those charges by Officer Lagore, a Columbus police officer with proper authority to do so. The liquor investigators conducted an

investigatory stop only and their interactions with the Defendant did not mature to the level of an arrest. *Berkemer v. McCarty* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed ..2d 694; *State v. Urbanski* (Dec. 20, 1994), Franklin App. No. 94APC04-51 1, unreported.

The state has argued that liquor control investigators have the statutory authority to stop and make arrests for certain traffic offenses under their general powers and, in the alternative, pursuant to R.C. 5502.61 (B). Defendant counters that the Investigators' authority is expressly limited by statute and suggests that the court would set a dangerous precedent if it

sanctions stops by plain clothes liquor investigators in unmarked vehicles.

For purposes of Defendant's argument, the court assumes two propositions of law: 1) that the investigators do not have the statutory authority to enforce traffic laws, which arguably may involve beer or alcohol, and 2) that the conduct of the investigators did not fall within the assistance permitted by R.C. 5502.61 (B). Even if the court accepts those propositions as true, Ohio courts have nonetheless consistently held that the exclusionary rule is ordinarily not applicable to evidence which is the product of police misconduct violative of state law, but not violative of

constitutional law. *Kettering v. Hollen* (1980), 64 Ohio St..2d 232; *State v. Peterson* (Apr. 21, 1993) Summit App. No. 15936, unreported; *State v. Murchison* (1991), 72 Ohio App.3d 840.; *State v. Wates* (July 10, 1990), Franklin App. No. 89AP-1296, unreported; *State v. Aleshire* (Aug. 5, 1986), Franklin App. No. 85AP.-869, unreported.

In Aleshlre, both the conduct that attracted his attention and the investigatory stop took place outside the Clinton Township officer's territorial jurisdiction. In refusing to suppress evidence flowing from the illegal stop and arrest, Judge Whiteside wrote in a frequently quoted portion of the opinion:

Even though the stopping was illegal because the officer had no jurisdiction within the territory where the conduct and stopping occurred, the exclusionary rule will not be applied if the officer had a constitutional basis in stopping the motorist, a seizure within the contemplation of the Fourth Amendment to the United states Constitution, except the fact that he was acting outside his jurisdiction. The observation of the officer of defendant's conduct was sufficient to permit the officer, within the perimeters (sic) of constitutional prohibitions against unreasonable seizures, to stop motorists for investigation as to the cause of erratic driving, even though no offense has been committed by the motorist * * * Thus even though the officer acted without jurisdiction in making the stop, there is no constitutional violation so long as an officer having jurisdiction would have had sufficient reasonable suspicion to make the traffic

> stop. Here, although the traffic stop was illegal under state law, it was constitutionally permissible. *State v. Aleshire* (Aug. 5, 1986), Franklin App. No. 85AP-869, unreported.

Although Defendant's detention may not have been caused by an officer with the authority to make such a stop, the stop itself was constitutional because it was based upon a reasonable articulable suspicion that Defendant may be violating the traffic laws, The court further notes that the case relied upon by Defendant, *State v. Grubb* (1993), 82 Ohio App.3d 187, is distinguishable because the Franklin County Court of Appeals never reached the issue of the significance of the Ohio State University police officer's lack of jurisdiction. The case was decided on

constitutional grounds, ie. that the officer lacked any reasonable suspicion to make the stop and the evidence was suppressed. It was suppressed in *Grubb* because of the constitutional violation, not because of the officer's lack of jurisdiction. Therefore, the evidehce will not be suppressed under the exclusionary rule. Defendant's motion to suppress is denied.

With respect to whether Officer Lagore had probable cause to arrest Defendant for OMVI and reckless operation, the state proved that probable cause for Defendant's arrest by Officer Lagore for both charges existed. Officer Lagore had conversations with the two liquor investigators, both experienced peace

officers, who described to him their personal observations about Defendant's Officer Lagore also observed defendant's failed field sobriety tests. excessive speed and erratic driving, and the odor of alcohol about Defendant's person Officer Lagore is permitted to rely upon a reliable source such as another peace officer to establish the foundation for probable cause. Liquor control investigators are peace officers. See R.C. 109.71, R.C. 2935.03 and R.C. 5502.61(A)(2).

With respect to the charge of underage consumption, it is-true that the liquor investigators did not have any basis to believe that Defendant had I consumed alcohol and was underage at the time they notified the Ohio State

Highway Patrol of their concerns about defendant's driving. However, reasonable suspicion sufficient to justify an investigatory stop may develop into something more during the brief detention to suggest to the officer that criminal activity is occurring or has occurred. In the course of the investigatory stop, Agent Betts obtained defendant's name and age and based upon the smell of alcohol, inquired whether defendant had been drinking. The odor of alcohol, the erratic driving and Defendant's age established sufficient probable cause to place defendant under arrest for underage consumption. The liquor investigators authority extends to violations of Title 43, regardless of whether they occur on a permit holder's

premises or not. Defendant was ultimately charged with a violation of R.C.4301.632, underage consumption.

STATE V. DROSTE

M9602TFC-107628

For the foregoing reasons, Defendant's motion to dismiss and motion to suppress are denied.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :

Plaintiff-Appellee, :

v. :

No. 96APC07-906

Brian A. Droste, : (ACCELERATED CALENDAR)

Defendant-Appellant. :

O P I N I O N

Rendered on April 1, 1997

Janet E. Jackson, City Attorney, *David M. Buchman* and *Brenda J. Kelner*, for appellee.

McCorkle & Minnillo, and *Christopher J. Minnillo*, for appellant.

APPEAL from the Franklin County Municipal Court.
BRYANT, J.

Defendant-appellant, Brian A. Droste, appeals from a judgment of the Franklin County Municipal Court overruling defendant's motions to suppress and to dismiss, and finding him guilty pursuant to R.C. 4511.19.

On February 26, 1996, Agent Willams and Agent Betts, two liquor control investigators, had just ended their shift and were driving south on State Route ("S.R") 315. Betts testified at trial that he observed defendant's vehicle pass his vehicle at approximately ninety to one hundred miles per hour. He watched as defendant's vehicle swerved from lane to lane without a turn signal, at times abruptly applying the brakes to avoid collision with another vehicle. Due to this observations, Betts contacted the Law Enforcement Emergency Radio Network ("LEERN") in order to alert a "marked unit." (Tr. 7.) Continuing southbound on S.R. 315, Betts was able to get the license plate number from defendant's car and to determine that the car contained a driver and three passengers.

Defendant exited S.R. 315 at Lane Avenue and stopped at the traffic signal at the end of the exit ramp. While defendant was stopped at the traffic signal, Betts

testified that he received instructions from LEERN to stop defendant's vehicle. Betts and Williams dressed plain clothes and driving an unmarked car, exited their vehicle and approached defendant's car. After identifying themselves as "police officers," they requested that defendant produce identification. Betts testified defendant stated his name and age, at which time Betts detected a strong odor of alcohol on defendant's person. At Betts' request, defendant exited his vehicle, using the vehicle to steady himself. Betts then identified himself as a liquor control investigator and read defendant his *Miranda* rights.

Betts questioned defendant, who admitted he had consumed several glasses of alcoholic beverage. Having already determined defendant was nineteen years old, Betts placed defendant under arrest for underage consumption, a fourth degree misdemeanor.

In a short time, Officer Lagore, a uniformed police officer with the city of Columbus, arrived at the scene in response to the message from LEERN. After Betts and

Williams informed Lagore of the events, which had transpired, Lagore questioned defendant, who admitted that he was driving the vehicle. During the questioning, Lagore could smell alcohol on or about defendant's person. Lagore observed as Williams administered the standard field sobriety tests. Concluding defendant failed the tests, Lagore arrested defendant for operating a motor vehicle while under the influences of alcohol ("OMVI") and took him to police headquarters to administer a breathalyzer test.

Defendant was charged with three traffic offenses: operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)*1), operating a motor vehicle with a prohibited breath alcohol content in violation of R.C. 4511.19.(B)(2), and reckless operation in violation of Columbus Traffic Code ("C.C.") Section 2133.02(A). He was also charged with underage consumption of alcohol in violation of R.C. 4301.632. Defendant filed motions to suppress and to dismiss, and a hearing was held on the motions. The trial court overruled

defendant's motion, defendant entered a plea of no contest to the charge of operating a motor vehicle while under the influence of alcohol, and the trial court found him guilty; the remaining charges were dismissed at the prosecution's request. Defendant appeals, assigning the following errors:

"I. THE TRIAL COURT ERRED WHEN IT FOUND THAT LIQUOR CONTROL INVESTIGATORS FROM THE DEPARTMENT OF PUBLIC SAFETY-LIQUOR ENFORCEMENT DIVISION WERE AUTHORIZED TO MAKE A TRAFFIC STOP FROM WHICH THE AGENTS GARNERED REASONABLE SUSPECTION [*sic*] TO CHARGE THE DEFENDANT WITH A VIOLATION OF UNDERAGE DRINKING AND A CHARGE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL.

"II. THE TRIAL COURT ERRED IN FINDING THAT LIQUOR CONTROL INVESTIGATORS FROM THE DEPARTMENT OF PUBLIC SAFETY-LIQUOR ENFORCEMENT DIVISION WERE ASKED TO ASSIST THE OHIO STATE HIGHWAY PATROL BY STOPPING THE DEFENDANT'S MOTOR VEHICLE, WHICH STOP RESULTED IN THE DEFENDANT BEING CHARGED WITH UNDERAGE CONSUMPTION OF ALCOHOL AND OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL.

"III. THE TRIAL COURT ERRED WHEN IT REFUSED TO APPLY THE EXCLUSIONARY RULE TO EVIDENCE WHICH IS THE PRODUCT OF POLICE MISCONDUCT.

"IV. THE TRIAL COURT ERRED WHEN IT FOUND THAT LIQUOR CONTROL INVESTIGATORS FROM THE DEPARTMENT OF PUBLIC SAFETY-LIQUOR ENFORCEMENT DEVISION WHERE PEACE OFFICERS WHO COULD PROVIDE RELIABLE INFORMATION WHICH CREATED PROBABLE CAUSE TO ARREST THE DEFENDANT."

In his first and second assignments of error, defendant challenges two findings allegedly made by the trial court: that the liquor control investigators had authority to make a traffic stop, and that the investigators' assistance was requested, as contemplated by R.C. 5502.61(b). In its June 26,1996 decision, however, the trial court specifically stated:

"For purposes of Defendant's argument, the court assumes two propositions of law: 1) that the investigators *do not have the statutory authority* to enforce traffic laws *** and 2) that the conduct of the investigators *did not fall within the assistance permitted* by R.C. 5502.61(B)." (Decision p. 4.) (Emphasis added.)

Defendant is attacking findings the court did not make. Therefore, defendant's first and second assignments of error are overruled.

In his third assignment of error, defendant contends that because the liquor control investigators exceeded their jurisdiction in stopping him, the exclusionary rule should operate to prohibit admission of evidence gained as a result

of the investigator's misconduct. In response, the state contends, as the trial court found, that any violation caused by the investigators' lack of authority to stop defendant did not rise to the level of a constitutional violation, thereby rendering the exclusionary rule inapplicable. In reaching its decision, the trial court relied on language from the syllabus of *Kettering v. Hollen* (1980), 64 Ohio St.2d 232:

> "The exclusionary rule will not be applied to the testimony of an arresting police officer regarding the actions of a misdemeanant observed as a result of an extra territorial warrantless arrest, even though the arrest is unauthorized under existing state law, if the arrest is based on probable cause that a crime was committed within the officer's jurisdiction, and if the officer was in hot pursuit of the misdemeanant."

Kettering applies to situations in which "the arrest was based on probable cause that a crime was committed *in the officer's jurisdiction.*" *Id.* (Emphasis added.) The jurisdiction granted liquor control investigators is outlined in the new enacted R.C. 5502.61. The jurisdictional grant allows liquor control investigators the authority to act in two different capacities: (1) as "peace officers" under R.C.

5502.61(A), and (2) as assistants to local law enforcement officers under R.C. 5502.61(B). Both jurisdictional grants are limited by particular circumstances. Because, however, the record supports the trial court's finding that the second jurisdictional grant, R.C. 5502.61(B), is not implicate in the present case, we do not address it.

Rather, focusing on the first jurisdictional grant under R.C. 5502.61(A)(2), we note it gives liquor control investigators the authority to act as "peace officers" only in two specific locations: (1) "on any retail liquor permit premises," and (2) "any other premises where a violation of Title XLIII of the Revised Code *** is occurring." Empowered by the "peace officer" status, the statute authorizes liquor control investigators to enforce fourteen other provisions of the Revised Code when witnessed during the enforcement of Title 43. R C. 5502.61(A)(3). None of the fourteen enumerated Revised Code sections involves the authority to make traffic stops for erratic driving. Because the investigators did not know defendant was underage or

had been drinking alcohol until after they stopped and questioned him, they were not enforcing Title 43 in stopping defendant. As a result, the investigators were outside their jurisdiction as "peace officers" when they first observed defendant's conduct, and when they detained and questioned defendant. The mandate of *Kettering,* requiring that an arrest be based on probably cause that a crime was committed *in the officer's jurisdiction*, is not present on these facts.

Rather, *State v. Grubb* (1993), 82 Ohio App.3d 187, resolves this case. *Grubb* held that where an illegal act and subsequent detention occur outside the jurisdiction of a police officer, the officer's actions are in violation of the Fourth and Fourteenth Amendments of the United States Constitution, thereby requiring application of the exclusionary rule. Like *Grubb*, defendant's illegal act and his subsequent detention occurred outside the jurisdiction of the liquor control investigators; their jurisdiction did not extend to S.R. 315 absent a reasonable suspicion that a violation of R.C. Title 43 had occurred. While *Grubb*

recognized the rationale of *Kettering*, it noted *Kettering* was inapplicable "since defendant was not observed to have engaged in conduct which would give rise to a reasonable belief that he had committed a crime upon university property in the extent of the officer's jurisdiction." *Grubb* at 192. Similarly, defendant here was not observed to have engaged in conduct which would give rise to a reasonable belief that he had violated Title 43 in the extent of the liquor control investigators' jurisdiction. Accordingly, pursuant to *Grubb*, the investigators' detention and questioning of defendant was unlawful and violated defendant's constitutional right to be free from unreasonable searches and seizures; the trial court erred in failing to apply the exclusionary rule. For the foregoing reasons, defendant's third assignment of error is sustained.

Defendant's fourth assignment of error contends the trial court erred in finding the liquor control investigators were peace officers who could provide reliable information to Officer Lagore upon which he could base a finding of

probable cause to arrest defendant for violations of R.C. 4511.19(A)(1) and 4511.19(B)(2).

Information supplied by officers engaged in a common investigation with an arresting officer may be used to establish probably cause for a warrantless arrest. *State v. Henderson* (1990), 51 Ohio St.3d 54. "So long as 'the law enforcement system as a whole has complied with the Fourth Amendment' and possesses facts adding up to probable cause, the arrest will be valid even though the arresting officer alone does not posses these facts." *Id.* At 57. Here, as noted, the liquor control investigators did not comply with the Fourth Amendment in detaining and questioning defendant because they lacked jurisdictional authority. Absent the investigators' unlawful stop of defendant's vehicle, they would not have had the opportunity to ask defendant whether he had been drinking, to smell the alcohol on his person, or to witness defendant's use of the vehicle to steady himself, all of which were conveyed to Officer Lagore when he arrived at the scene and allegedly provided

him probable cause to arrest defendant for OMVI. Because the facts the investigators conveyed to Lagore were obtained in violation of defendant's Fourth Amendment rights; the arrest cannot be validated under *Henderson.*

In response, the state suggests that even if the investigators were not acting as contemplated under *Henderson*, they qualify as citizen informants. Even as private citizens, however, the investigators went beyond their authority in detaining defendant. R.C. 2935.04 provides:

> "When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

The statute authorizes detention and warrantless arrest by private citizens for felonies committed or believed to have been committed; commission of a misdemeanor is not a basis upon which a private individual detains and or arrests another. *Jackson v. Gossard* (1989), 48 Ohio App.3d 309. Nor does the record support a finding that the

investigators reasonably believed defendant committed a felony.

Moreover, the investigators never purported to be acting as private citizens. To sanction the city's argument would allow law enforcement officers acting outside their jurisdiction to circumvent the Fourth Amendment simply by contending they were acting as private citizens at the time they detained an alleged violator. Because the investigators here were not authorized to detain defendant under R.C. 2935.04, the facts gained from the unlawful detention cannot support probable cause for Officer Lagore to arrest defendant.

For the foregoing reasons, we sustain defendant's fourth assignment of error.

Having overruled defendant's third and fourth assignments of error, the judgment of the trial court is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reserved and
Case remanded.

YOUNG and DESHLER, JJ., concur.

The State of Ohio, Appellant, v. Droste, Appellee.

[Cite as State v. Droste (1998), ___ Ohio St.3d ___.]

Statutes — Absent violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule.

Absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule.

(No. 97-998 — Submitted May 12, 1998 — Decided August 19, 1998.)

Appeal from the Court of Appeals for Franklin County, No. 96APC07-906.

Late at night on February 24, 1996, towards the end of their shift, investigators Michael Betts and Philip Williams of the Ohio Department of Liquor Control were driving on State Route 315 in Columbus, Ohio, when a vehicle traveling at approximately ninety to one hundred miles per hour passed them. The investigators observed the vehicle move from the center lane to the left lane without a turn signal, abruptly slow down for a vehicle in the left lane, then move back into the left lane without a turn signal. The investigators

continued to observe the vehicle while they reported their observations and location to the Law Enforcement Emergency Radio Network ("LEERN"), a city and state law enforcement radio system. The vehicle slowed down for traffic in its path, and the investigators were able to note the vehicle's license plate number and to positively identify the driver and the vehicle's three other occupants.

The vehicle then exited State Route 315 at Lane Avenue and stopped at a traffic light. Just after the vehicle stopped at the light, the investigators received a communication over LEERN to request that they stop the vehicle and to tell them that a marked law enforcement car was on the way. The investigators exited their vehicle and approached the other vehicle. They identified themselves as police officers, and asked the driver for his name and identification. The driver, Brian A. Droste, appellee-defendant herein, stated his name and age. Investigator Betts noted an odor of alcohol about Droste and asked him to exit the vehicle.

Betts observed that Droste needed to use the vehicle for support when he exited the vehicle. Betts read Droste his Miranda rights and then asked Droste how much he had had to drink. Droste responded that he had drunk several glasses of gin. Betts determined that Droste was underage and arrested him for underage drinking.

Meanwhile, Officer Lagore of the Columbus Police Department responded to a request he had received over LEERN to assist the liquor control investigators. Lagore himself did not make the original request of the investigators for assistance in stopping the vehicle. Lagore arrived on the scene when Droste had exited the vehicle and the investigators had arrested him for underage drinking. The liquor control investigators informed Lagore of their observations: the vehicle's high rate of speed and the erratic driving and weaving. Lagore asked Droste whether Droste had been driving the vehicle and Droste responded, "yes." Lagore could smell alcohol on Droste and asked whether

Droste had been drinking. Droste confirmed that he had been drinking earlier in the evening.

Investigator Williams then performed a field sobriety test on Droste, under Lagore's observation. Droste performed poorly on these tests, and Lagore arrested him for operating a motor vehicle while under the influence of alcohol ("OMVI") and for reckless operation. Lagore then transported Droste to Columbus police headquarters, followed by the two liquor control investigators, where Droste submitted to a breathalyzer test, resulting in a blood-alcohol content level of 0.124 percent.

Lagore charged Droste with operating a motor vehicle while under the influence of alcohol, a violation of R.C. 4511.19(A)(1) and (B)(2), and for reckless operation, a violation of Columbus City Code 2133.02(A) (later amended to charge a violation of the comparable state statute, R.C.

4511.20). Investigator Betts charged Droste with underage drinking, a violation of R.C. 4301.632.

On April 9, 1996, Droste filed motions to suppress evidence and to dismiss the charges. On June 26, 1996, the trial court denied both motions. Droste pled no contest to one count of OMVI and to the count of reckless operation. The trial court dismissed the remaining charges.

Droste appealed the trial court's decision, asserting that the liquor control investigators did not have jurisdiction to stop his vehicle, and therefore all evidence obtained subsequent to the traffic stop must be suppressed. On April 1, 1997, the court of appeals reversed the conviction.

This cause is now before this court upon the allowance of a discretionary appeal.

Janet E. Jackson, Columbus City Attorney, Stephen L. McIntosh, City Prosecutor, and Brenda J. Keltner, Assistant City Prosecutor, for appellant.

McCorkle & Minnillo and Christopher J. Minnillo, for appellee.

D. Timothy Huey, urging affirmance for amicus curiae, Ohio Association of Criminal Defense Lawyers.

Alice Robie Resnick, J. The issues presented by this case are (1) whether liquor control investigators have the authority to stop an individual for violating traffic laws, and (2) if the liquor control investigators did not have the authority to make a traffic stop, must all evidence deriving from that stop be suppressed.

R.C. 5502.61(C) and (D)[1] set forth the authority granted by the legislature to liquor control investigators:

"(C)(1) A liquor control investigator, on any retail liquor permit premises or any other premises where a violation of Title XLIII of the Revised Code or any rule adopted under it

is occurring, has the authority vested in peace officers under section 2935.03 of the Revised Code to keep the peace and to enforce and make arrests for those violations. A liquor control investigator may also execute search warrants and seize and take into custody any property relating to any of those violations.

"(2) A liquor control investigator who is on, immediately adjacent to, or across from a retail liquor permit premises and is performing investigative duties relating to that premises or who is on a tract of land that is not a liquor permit premises but where violations of Title XLIII of the Revised Code allegedly are occurring, or who is in view of a suspected violation of Title XLIII of the Revised Code, has the authority to enforce that title and sections 2903.12, 2903.13, 2903.14, 2907.09, 2917.11, 2921.13, 2921.31, 2921.32, 2921.33, 2923.12, 2923.121, 2925.11, 2925.13, and 4507.30 of the Revised Code if the offense is witnessed during an investigation of or the enforcement of an offense

described in Title XLIII of the Revised Code. Nothing in this section shall be construed to supersede or curtail local law enforcement authority.

" * * *

"(D) A liquor control investigator may render assistance to a state or local law enforcement officer at that officer's request or in an emergency. A liquor control investigator who renders assistance authorized by this division to a state or local law enforcement officer shall be considered as performing services within the scope of the investigator's regular employment. * * * "

Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded. *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997, 1000; *Indep. Ins. Agents of Ohio,*

Inc. v. Fabe (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, 817; *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171, 28 OBR 262, 503 N.E.2d 167.

In R.C. 5502.61(C), the General Assembly listed the specific criminal violations that it authorized liquor control investigators to enforce: any violation under R.C. Title 43, and specific violations under R.C. Titles 29 and 45,[2] if the investigators witnessed the commission of the offense during an investigation or the enforcement of an offense described in R.C. Title 43. Traffic offenses (other than R.C. 4507.30), including the offense of OMVI (R.C. 4511.19) are not listed and therefore the General Assembly did not envision liquor control investigators routinely enforcing the traffic laws. Additionally, in the case sub judice, the investigators were not in the process of investigating or enforcing an R.C. Title 43 offense when they saw appellee driving erratically, and thus they did not have authority to stop him.

We therefore conclude that the authority granted in R.C. 5502.61 to liquor control investigators to investigate and enforce offenses under R.C. Title 43 and certain offenses under R.C. Title 29 and Title 45 does not confer authority upon a liquor control investigator to stop a driver for violating traffic laws, if the investigator was not in the process of investigating one of the offenses listed in R.C. 5502.61. See, generally, *Cincinnati v. Alexander* (1978), 54 Ohio St.2d 248, 254, 8 O.O.3d 224, 227, 375 N.E.2d 1241, 1245, and at syllabus; *State v. Holbert* (1974), 38 Ohio St.2d 113, 116-117, 67 O.O.2d 111, 113, 311 N.E.2d 22, 25, and at paragraph two of the syllabus.

The General Assembly did provide a limited circumstance when liquor control investigators may involve themselves in the enforcement of other, non-listed offenses: when rendering assistance to state or local law enforcement officers or in an emergency. R.C. 5502.61(D). But in the

case sub judice, there is no supportable evidence in the record to support the supposition that a state or local law enforcement officer did indeed request assistance or that the situation constituted an emergency. At the suppression hearing, investigator Betts testified that he received a request over LEERN, but failed to identify just who made that request. Also at the hearing, Officer Lagore testified that he definitely did not make the request. Because there was no evidence in the record of the request for assistance coming from "a state or local law enforcement officer," we cannot find that the investigators followed the authority provided in R.C. 5502.61(D).

Having found that the liquor control investigators violated the statute granting them authority to stop and arrest appellee, we next consider whether the information they provided to Officer Lagore must be suppressed. We have stated on many occasions that absent a violation of a constitutional right, the violation of a statute does not invoke

the exclusionary rule. *Hilliard v. Elfrink* (1996), 77 Ohio St.3d 155, 158, 672 N.E.2d 166, 169; *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 5-6, 573 N.E.2d 32, 36 (Alice Robie Resnick, J., dissenting); *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 235, 18 O.O.3d 435, 437, 416 N.E.2d 598, 600.

The record in the case sub judice reveals that appellee's constitutional rights were not violated. According to Betts's testimony, Droste stopped on his own accord at the traffic light when he exited State Route 315. Lagore testified that when he arrived on the scene, the liquor control investigators told him of the vehicle's excessive speed and of Droste's erratic driving and weaving.[3] Lagore could smell alcohol on Droste. Upon questioning by Lagore, Droste admitted that he had been driving the vehicle and that he had been drinking earlier in the evening. Droste subsequently failed the field sobriety tests. Based on the foregoing facts, Lagore had probable cause to arrest Droste. Thus, Droste's rights

under the Fourth Amendment were not violated, and the evidence should not be suppressed.

We reverse the judgment of the court of appeals and reinstate the trial court's conviction of appellee.

Judgment reversed.

Moyer, C.J., Douglas, F.E. Sweeney and Cook, JJ., concur.

Lundberg Stratton, J., concurs separately.

Pfeifer, J., dissents and would affirm the judgment of the court of appeals.

Lundberg Stratton, J., concurring. I agree with the majority but take exception with the conclusion that there is no supportable evidence in the record that the situation facing the liquor control investigators constituted an emergency. The investigators observed the operator of a vehicle driving ninety to one hundred miles per hour and changing lanes recklessly. Such behavior clearly was cause for alarm. This evidence is sufficient to constitute an emergency situation

and the investigators' failure to act may have led to tragic consequences on the highway, especially in light of the fact that the defendant's blood-alcohol content tested at a level of 0.124.

R.C. 5502.61(D) authorizes a liquor control investigator to render assistance "at that officer's request or in an emergency." Because the statute is written in the disjunctive, the investigator may give assistance in an emergency without also being requested to do so by an officer. Although these investigators did receive a request over LEERN to stop the vehicle, this situation clearly constituted an emergency. Therefore, I believe the investigators were authorized to make the stop.

FOOTNOTES:

[1] R.C. 5502.61 has been amended since the time of the stop and arrest that are the subject of the case sub judice. Other than changing the designation of the paragraphs we are analyzing here, the changes to the statute do not affect our decision herein. (146 Ohio Laws, Part III, 6022-6023.)

[2] The offenses listed in R.C. 5502.61(C)(2) are aggravated assault, assault, negligent assault, public indecency, disorderly conduct, falsification, obstructing official business, obstructing justice, resisting arrest, carrying concealed weapons, illegal possession of a firearm in a liquor permit premises, possession of drugs, permitting drug abuse, and committing prohibited acts involving a false or illegal identification card or driver's license.

[3] The mere providing to a police officer of information upon which that officer will base and continue a criminal investigation and eventually file a criminal complaint is not an exercise of the authority "to keep the peace and to enforce

and make arrests" as stated in R.C. 5501.61(C)(1). *Holbert*, 38 Ohio St.2d at 117, 67 O.O.2d at 113-114, 311 N.E.2d at 25. Thus, Officer Lagore could rely on the information provided to him by the liquor control investigators to complete his investigation.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v .

Brian A. Droste,

Defendant-Appellant.

JOURNAL ENTRY

No. 96APC07-906

(ACCELERATED CALENDAR)

For the reasons stated in the memorandum decision of this court rendered herein on May 13, 1997, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of *State v. Filler* (1995), 106 Ohio App.3d 731, *State v. Rucker* (Mar. 20, 1995), Stark App. No. 1994 CA 224, unreported,

State v. Pruey (Feb. 6, 1987), Lake App. No. 11-246, unreported, *State v. Cooley* (Oct. 19, 1994), Hamilton App. No. C-930644, unreported, and *State v. Tennison* (Apr. 14, 1989), Wood App. No. WD-88-41, unreported I is overruled.

YOUNG, BRYANT and DESHLER, JJ.

By /s/Peggy Bryant
Judge
Peggy Bryant

cc: David M. Buchman, ACA
Christopher J. Minnillo, Esq.

The State filed a Motion to Certify Conflict on April 14, 1997, alleging that the ruling in the instant matter was in conflict with decisions from five other Ohio appellate districts on the following issue:

> Where an agent of the state acts entirely outside his or her- statutory grant of authority in searching, detaining or seizing an individual, does the fact that the act was beyond a statutory grant authority mean that any evidence obtained as a result of the search, seizure, or detention must be suppressed?

The Tenth District Court of Appeals overruled the State's Motion to Certify Conflict on May 13, 1997.

[excerpt from page 6 of The State of Ohio's Memorandum in Support of Jurisdiction filed in the Ohio Supreme Court]

Section 109.54

General Assembly: 122.

Bill Number: S.B. 53

Effective Date: 10/14/97

(A) The bureau of criminal identification and investigation may investigate any criminal activity in this state that is of statewide or intercounty concern when requested by local authorities and may aid federal authorities, when requested, in their investigation of any criminal activity in this state. The bureau may investigate any criminal activity in this state involving drug abuse or illegal drug distribution prohibited under Chapter 3719. or 4729. of the Revised Code. The superintendent and any agent of the bureau may participate, as the director of an organized crime task force established under section 177.02 of the Revised Code or as a member of the investigatory staff of a task force established under that section, in an investigation of organized criminal activity anywhere within this state under sections 177.01 to 177.03 of the Revised Code.

Section 109.51

General Assembly: 105.

Bill Number: Amended House Bill 263

Effective Date: 9/24/63

There is hereby created in the office of the attorney general, a bureau of criminal identification and investigation to be located at the site of the London correctional institution. The attorney general shall appoint a superintendent of said bureau. The superintendent shall appoint, with the approval of the attorney general, such assistants as are necessary to carry out the functions and duties of the bureau as contained in sections 109.51 to 109.63, inclusive, of the Revised Code.

Section 2901.01

General Assembly: 121.

Bill Number: Sub. S.B. 277

Effective Date: 03/31/97

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement, or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering, or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property, or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property, or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03,

2921.04, 2921.34, or 2923.161 or of division (A)(1), (2), or (3) of section 2911.12 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section or division or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10)(a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable

television service, computer data, computer software, financial instruments associated with computers, and other documents associated with computers, or copies of the documents, whether in machine or human readable form. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in this division and division (A)(13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," and "data" have the same meaning as in section 2913.01 of the Revised Code.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force

employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) An Ohio veterans' home police officer appointed under section 5907.02 of the Revised Code;

(j) A member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code.

(12) "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

(13) "Contraband" means any property described in the following categories:

(a) Property that in and of itself is unlawful for a person to acquire or possess;

(b) Property that is not in and of itself unlawful for a person to acquire or possess, but that has been determined by a court of this state, in accordance with law, to be contraband because of its use in an unlawful activity or manner, of its nature, or of the circumstances of the person who acquires or possesses it, including, but not limited to, goods and personal property described in division (D) of section 2913.34 of the Revised Code;

(c) Property that is specifically stated to be contraband by a section of the Revised Code or by an ordinance, regulation, or resolution;

(d) Property that is forfeitable pursuant to a section of the Revised Code, or an ordinance, regulation, or resolution, including, but not limited to, forfeitable firearms, dangerous ordnance, obscene materials, and goods and personal

property described in division (D) of section 2913.34 of the Revised Code;

(e) Any controlled substance, as defined in section 3719.01 of the Revised Code, or any device, paraphernalia, money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in a violation of, Chapter 2925. or 3719. of the Revised Code;

(f) Any gambling device, paraphernalia, money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in the violation of, Chapter 2915. of the Revised Code;

(g) Any equipment, machine, device, apparatus, vehicle, vessel, container, liquid, or substance that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in the violation of, any law of this state relating to alcohol or tobacco;

(h) Any personal property that has been, is being, or is intended to be used in an attempt or conspiracy to commit, or in the commission of, any offense or in the transportation of the fruits of any offense;

(i) Any property that is acquired through the sale or other transfer of contraband or through the proceeds of contraband, other than by a court or a law enforcement agency acting within the scope of its duties;

(j) Any computer, computer system, computer network, or computer software that is used in a conspiracy to commit, an attempt to commit, or in the commission of any offense, if the owner of the computer, computer system, computer network, or computer software is convicted of or pleads guilty to the offense in which it is used.

(14) A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person

did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) "Unborn human" means an individual organism of the species homo sapiens from fertilization until live birth.

(ii) "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining

and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of section 2903.01, 2903.02, 2903.03, 2903.04,

2903.05, 2903.06, 2903.07, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, section 2919.15, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, section 2919.15, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

Section 2935.01

General Assembly: 121.

Bill Number: Amended Sub. House Bill 72

Effective Date: 03/18/97

As used in this chapter:

(A) "Magistrate" has the same meaning as in section 2931.01 of the Revised Code.

(B) "Peace officer" includes, except as provided in section 2935.081 of the Revised Code, a sheriff, deputy sheriff, marshal, deputy marshal, member of the organized police department of any municipal corporation, including a member of the organized police department of a municipal corporation in an adjoining state serving in Ohio under a contract pursuant to section 737.04 of the Revised Code, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, member of a police force employed by a regional transit authority under division (Y) of section 306.05 of the Revised Code, state university law

enforcement officer appointed under section 3345.04 of the Revised Code, liquor control investigator or food stamp trafficking agent of the department of public safety, Ohio veterans' home policeman appointed under section 5907.02 of the Revised Code, police constable of any township, and police officer of a township or joint township police district, and, for the purpose of arrests within those areas, and for the purposes of Chapter 5503. of the Revised Code, and the filing of and service of process relating to those offenses witnessed or investigated by them, includes the superintendent and troopers of the state highway patrol.

Section 2935.04

General Assembly: 100.

Bill Number: House Bill 1

Effective Date: 10/01/53

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

Section 5502.61

General Assembly: 121.

Bill Number: Amended Sub. House Bill 566

Effective Date: 10/16/96

(A) As used in this section, "felony" has the same meaning as in section 109.511 of the Revised Code.

(B)(1)(a) Any person employed by the director of public safety and designated by the director to enforce Title XLIII of the Revised Code shall be known as a liquor control investigator and shall serve within the department's investigation unit. The director shall not employ a person as a liquor control investigator in the investigation unit engaged in the enforcement of Title XLIII of the Revised Code on a permanent basis, on a temporary basis, for a probationary term, or on other than a permanent basis if the person previously has been convicted of or has pleaded guilty to a felony.

(2)(a) The director of public safety shall terminate the employment of a liquor control investigator in the

investigation unit of the department engaged in the enforcement of Title XLIII of the Revised Code if the liquor control investigator does either of the following:

(i) Pleads guilty to a felony;

(ii) Pleads guilty to a misdemeanor pursuant to a negotiated plea agreement as provided in division (D) of section 2929.29 of the Revised Code in which the liquor control investigator agrees to surrender the certificate awarded to that investigator under section 109.77 of the Revised Code.

(b) The director of public safety shall suspend from employment a liquor control investigator in the investigation unit of the department engaged in the enforcement of Title XLIII of the Revised Code if the liquor control investigator is convicted, after trial, of a felony. If the liquor control investigator files an appeal from that conviction and the conviction is upheld by the highest court to which the appeal is taken or if the liquor control investigator does not file a timely appeal, the director shall terminate the employment of that investigator. If the liquor control investigator files an

appeal that results in that investigator's acquittal of the felony or conviction of a misdemeanor, or in the dismissal of the felony charge against that investigator, the director shall reinstate that investigator. A liquor control investigator who is reinstated under division (B)(2)(b) of this section shall not receive any back pay unless that investigator's conviction of the felony was reversed on appeal, or the felony charge was dismissed, because the court found insufficient evidence to convict that investigator of the felony.

(3) Division (B) of this section does not apply regarding an offense that was committed prior to January 1, 1997.

(4) The suspension from employment, or the termination of the employment, of a liquor control investigator under division (B)(2) of this section shall be in accordance with Chapter 119. of the Revised Code.

(C)(1) A liquor control investigator, on any retail liquor permit premises or any other premises where a violation of Title XLIII of the Revised Code or any rule adopted under it is occurring, has the authority vested in peace officers under

section 2935.03 of the Revised Code to keep the peace and to enforce and make arrests for those violations. A liquor control investigator may also execute search warrants and seize and take into custody any property relating to any of those violations.

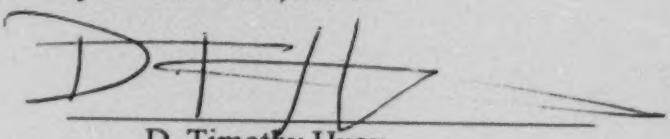
(2) A liquor control investigator who is on, immediately adjacent to, or across from a retail liquor permit premises and is performing investigative duties relating to that premises or who is on a tract of land that is not a liquor permit premises but where violations of Title XLIII of the Revised Code allegedly are occurring, or who is in view of a suspected violation of Title XLIII of the Revised Code, has the authority to enforce that title and sections 2903.12, 2903.13, 2903.14, 2907.09, 2917.11, 2921.13, 2921.31, 2921.32, 2921.33, 2923.12, 2923.121, 2925.11, 2925.13, and 4507.30 of the Revised Code if the offense is witnessed during an investigation of or the enforcement of an offense described in Title XLIII of the Revised Code. Nothing in this

section shall be construed to supersede or curtail local law enforcement authority.

(3) Before exercising any powers of a peace officer as defined in section 2935.01 of the Revised Code, a liquor control investigator shall comply with the certification requirements of section 109.77 of the Revised Code, take an oath of office, and receive from the governor, upon the director of public safety's recommendation, a commission indicating authority to make arrests as authorized by this section.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage pre-paid, by ordinary U.S. Mail to Janet E. Jackson, Columbus City Attorney, Stephen L. McIntosh, City Prosecutor, and Brenda J. Keltner, *Counsel of Record* Assistant City Prosecutor, for respondent, this 10th day of December, 1998.



D. Timothy Huey

Supreme Court, U.S.
FILED
APR 29 1999
OFFICE OF THE CLERK

NO. 98-1560

In The
Supreme Court of the United States
October Term, 1998

BRIAN A. DROSTE,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari
To the Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Where a government agent acts with a good faith belief that he is within his limited statutory jurisdiction when he makes an investigatory stop, is the detention unreasonable per se under the Fourth and Fourteenth Amendments to the United States Constitution when later found to be technically outside the scope of his statutory jurisdiction?

2. Can a citizen use reasonable force to resist an unlawful arrest?

3. Where a state legislature has enacted a statute purporting to limit the jurisdiction of a state agent and where the limiting terms are left undefined, must a detention subsequently determined to have been made outside of those jurisdictional limitations implicate a provision of the United States Constitution?

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STATEMENT OF JURISDICITON

Petitioner's question relating to the right of a citizen to "use all reasonable force, including deadly force, to resist any unlawful arrest" was not raised in any prior proceeding in this case. This Court should therefore decline to consider that question for lack of jurisdiction.

STATEMENT OF THE CASE

Around midnight on February 26, 1996, the Petitioner, Brian A. Droste, was operating his vehicle southbound on State Route 315 within the City of Columbus, Ohio. At a speed approaching 100 m.p.h., the Petitioner passed at least one vehicle – causing said vehicle to swerve to avoid being sideswiped – then changed lanes, without signaling, from the center lane to the left lane and abruptly applied his brakes to avoid colliding with other vehicles. The unmarked vehicle the Petitioner had passed contained two on-duty, plain-clothed, liquor control investigators: Agents Michael Betts and Philip Williams.

The liquor control investigators aired their observations on the Law Enforcement Emergency Radio Network ("LEERN") and requested that a marked cruiser respond. The Ohio State Highway Patrol responded to the call and asked the agents to report their location so that a cruiser could be dispatched. All the while, the Petitioner's vehicle continued southbound at the same speed, abruptly

changing lanes from the center to the right lane thereby cutting off the vehicle in the right lane. The Petitioner's vehicle then decelerated rapidly – allowing the agents to catch-up – and exited State Route 315 at Lane Avenue, coming to a stop at the traffic light at the end of the ramp. Upon marking the position of the Petitioner, the agents were advised by LEERN to stop the vehicle and that a marked cruiser was on the way – estimated time of arrival, unknown.

The agents approached the Petitioner's vehicle, identified themselves, and displayed their badges. The agents asked the four vehicle occupants to place their hands where the agents could see them – upon the agents' second request, the occupants complied. The Petitioner/driver was asked to state his name. The Petitioner gave his name and his age (Petitioner was under twenty-one years of age, the legal drinking age in Ohio) at which point Agent Betts detected a strong odor of an alcoholic beverage upon the Petitioner's person. The Petitioner was asked to exit his vehicle and he did so, using the vehicle for support. Agent Betts advised the Petitioner that Betts was with Liquor

Enforcement and read the Petitioner his Miranda rights. The Petitioner waived his right to remain silent and stated that he had consumed several glasses of gin.

Approximately five minutes after the stop, Officer Robert Lagore of the Columbus Division of Police arrived in uniform and in a marked cruiser. Officer Lagore had not been in contact with the agents prior to his arrival at the scene; all the information possessed by Officer Lagore at that time had been relayed to him by the State Highway Patrol dispatcher. Agents Betts and Williams advised Officer Lagore of their previous observations of the Petitioner's driving.

In response to Officer Lagore's inquiries, the Petitioner gave his name, his age and stated both that he had been driving the vehicle and drinking earlier in the evening. During the course of their conversation, Officer Lagore noticed an odor of an alcoholic beverage on or about the Petitioner's person. Officer Lagore requested that the Petitioner submit to field sobriety tests. Agent Williams asked if he could administer the tests for experience and Officer Lagore agreed. Under Officer Lagore's observation, Agent

Williams properly conducted the tests and the Petitioner failed.

Officer Lagore arrested the Petitioner for Operating a Motor Vehicle While Under the Influence ("OMVI") in violation of Ohio Revised Code section 4511.19(A)(1) and transported him to the downtown site for a breath test. The Petitioner agreed to submit and the results indicated a BAC level of .124 – over the legal limit in Ohio of .10 and well over the legal limit of .02 for those under the age of twenty-one. Officer Lagore charged the Petitioner with OMVI, Operating a Motor Vehicle with a Prohibited Concentration of Alcohol while Underage in violation of Ohio Revised Code section 4511.19(B)(2) ("OMVUAC"), and reckless operation under the Columbus City Code section 2133.02(A) (later amended to reflect a state code violation under Ohio Revised Code section 4511.20). Agent Betts charged the Petitioner with underage consumption (Ohio Revised Code section 4301.632).

The Petitioner entered a plea of not guilty as to all four charges and filed a combined Motion to

Dismiss and to Suppress. On May 8, 1996, a hearing was conducted on the Petitioner's motions. The trial court, in a written decision issued on June 25, 1996, found that the Petitioner was placed under arrest for the traffic offenses by Officer Lagore and not by the liquor agents. The trial court further held that the liquor agents conducted an investigatory stop only and that their interactions with the Petitioner did not arise to the level of an arrest.

In deciding the motion to suppress, the trial court first addressed the issue of the agents' authority to conduct an investigatory stop. The Petitioner had argued that the agents were acting outside of their statutory authority when they detained him; the State countered that the agents were acting within their statutory authority in that they were either assisting the Columbus Police Department or acting in an emergency situation or both in accordance with Ohio Revised Code section 5502.61(B)[1]. For the purposes of Petitioner's argument, the trial court assumed – but did not

[1] In 1998, Ohio Revised Code section 5502.61 was amended. The changes, as relate to the issues at hand, were of form rather than substance. Former Ohio Revised Code section 5502.61(B) is now codified at Ohio Revised Code section 5502.61(D). The Petitioner, in his appendix, includes a copy of the statute however, paragraphs (D)

hold – that: (1) the investigators do not have statutory authority to enforce traffic laws and (2) the conduct of the investigators was not within the assistance authorized by Ohio Revised Code section 5502.61(B). The trial court then went on to hold that even if these two assumptions were found to be true, the exclusionary rule would not apply to evidence that is the product of police misconduct violative of state law but not violative of constitutional law.

The trial court specifically found that the stop of the Petitioner was constitutional in that it was based upon a reasonable, articulable suspicion that the Petitioner may have been violating the traffic laws. Declining to apply the exclusionary rule to a violation of state law that did not arise to a constitutional violation, the trial judge overruled Petitioner's motion to suppress.

The trial court next addressed the Petitioner's motion to dismiss the traffic offenses. The court held that the State had proven that Officer Lagore had probable cause to arrest the Petitioner for the three offenses. Specifically, the trial court found that

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and (E) have been omitted. A complete copy has been attached in the appendix to this Brief in Opposition.

Officer Lagore could rely upon the information received from a reliable source, such as another peace officer, to establish probable cause. The information related to Office Lagore by the agents regarding their observations of Petitioner's driving, coupled with the odor of alcohol, and the Petitioner's failing performance on the field sobriety tests were held to be sufficient to establish probable cause. The Petitioner's motion to dismiss was overruled.

Pursuant to a plea bargain, the Petitioner entered a plea of "no contest" to the charge of OMVI and the remaining charges were dismissed. The trial court found him guilty and the Petitioner appealed to the Court of Appeals of Ohio, Tenth Appellate District.

In a misreading of the opinion of the trial court, the Court of Appeals stated that the trial judge found the agents to have been outside their statutory grant of jurisdictional authority[2]. The Tenth District then went

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[2] The Petitioner makes a similar misreading when he asserts that the Respondent conceded that the agents were not acting within the scope of their authority. (Petition, 20) While the State has assumed, *arguendo*, that the agents were beyond the limits of their authority, that was necessitated by the trial court having made that assumption in

on to hold that the exercise of police powers outside of that statutory authority was, per se, a violation of the Fourth Amendment. The Court of Appeals further found the trial court erred in failing to apply the exclusionary rule. Finally, the Tenth District held that since the facts the agents conveyed to Officer Lagore were obtained in violation of the Petitioner's Fourth Amendment rights, Officer Lagore could not rely upon the facts in establishing probable cause to arrest the Petitioner for OMVI. The judgement of the trial court was reversed and remanded on April 1, 1997.

Following a denial by the Tenth District to certify a conflict[3], the State of Ohio sought and was granted leave to file a discretionary appeal to the Ohio Supreme Court. In a decision rendered on August 19,

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deciding the case. Given the facts of the case and the language of the empowering statute, the State still maintains that the agents were rendering assistance and/or involved in an emergency situation in accordance with state law.

[3] The petition states that the State "framed the sole issues" in this matter in the State's Motion to Certify Conflict. (Petition, 16). This is an incorrect statement. While the issue quoted in the Petitioner's brief was the only one stated for purposes of an appeal based upon a conflict among the districts, the discretionary appeal that was granted did not limit the State to this one issue nor did the State limit itself. The reason for the sole issue in that Motion was simple – it was the issue that formed the basis for the conflict. It was not, however, the only issue in the case.

1998, the Ohio Supreme Court held, in its syllabus, that "absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule." (Petitioner's Appendix C, 1) The Court found that the liquor agents violated the statute granting them arrest authority when they detained the Petitioner. The Court went on to state, however, that the record demonstrated that no constitutional rights of the Petitioner were violated. Specifically, The Ohio Supreme Court found that the Petitioner stopped on his own accord and that Officer Lagore had probable cause to arrest him for OMVI.

The Ohio Supreme Court went on to state that the "mere providing to a police officer of information upon which that officer will base and continue a criminal investigation and eventually file a criminal complaint is not an exercise of the authority 'to keep the peace and to enforce and make arrests.'" (Petitioner's Appendix C, 15-16) Thus Officer Lagore could rely upon the liquor agents' observations of Petitioner's driving in establishing probable cause to arrest the Petitioner for OMVI. Where no

constitutional violation existed, the Ohio Supreme Court declined to invoke the exclusionary rule for a violation of a state statute.

This petition followed.

REASONS FOR DENYING THE WRIT

Before a proper response to the petition can be articulated, it is important to first ascertain which issues the Petitioner is seeking to have reviewed. Pursuant to the Ohio Supreme Court Rules for the Reporting of Opinions, the Ohio Supreme Court speaks through its syllabus. (Rule 1, Supreme Court Rules for the Reporting of Opinions) The holding in this case was simply stated: "Absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule." (Petitioner's Appendix C, 1)

The petitioner does not appear to be challenging the holding of the Ohio Supreme Court. In fact, the third question presented for review is not even inconsistent with that decision. By limiting the decision to those instances where a constitutional right has not been violated, the Ohio Supreme Court allows for the possibility that, given other circumstances, some violations of state law may implicate constitutional provisions. Rather, the Petitioner implies that the law was misapplied in this instance.

Furthermore, it is important to note that the Petitioner has not questioned the applicability of the exclusionary rule. The petition mentions suppression only twice: when quoting from the State's Motion to Certify Conflict (Petition, 16) and when quoting from a Florida District Court opinion (Petition, 17).[4] As this Court stated in *Illinois v. Gates*, 462 U.S. 213 (1983):

> The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. -

Gates, 462 U.S. at 223 *citing United States v. Havens*, 446 U.S. 620 (1980); *United States v. Ceccolini*, 435 U.S. 268 (1976); *United States v. Calandra*, 414 U.S. 338 (1974); *Stone v. Powell*, 428 U.S. 465 (1976).

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[4] The Petitioner neglects to mention that the Florida District Court ultimately held that the arrest was lawful "so long as the probable cause justifying the arrests was lawfully obtained." *Florida v. Phoenix*, 428 So. 2d 262, 264 (1982).

Since the applicability of the exclusionary rule has not been raised, neither the scope of nor any exception to – such as the good faith exception – its application is presented for review.

With the aforementioned limitations in mind, the Respondent argues the following reasons for denying the petition for writ of certiorari.

I. Given the limited scope of the questions presented for review, the petition is calling for a merely advisory opinion.

When discussing this Court's jurisdiction to hear a federal question where an adequate and independent state ground for the ruling exists, the Court framed the issue as follows:

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Michigan v. Long, 463 U.S. 1032, 1042 (1983) *quoting Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). While the

Ohio Supreme Court did not base its decision on independent state grounds, the arguments against issuing advisory opinions would advocate a denial of the writ where the questions presented fail to seek review of the alternative federal grounds for upholding the state court ruling.

Specifically, the Petitioner urges this Court to find that a violation of a state statute limiting the jurisdictional authority of a state actor is unreasonable per se and, thus, in contravention of the Fourth and Fourteenth Amendments. However, the Petitioner does not present for review the issue of the applicability of the exclusionary rule should this Court find in their favor. The exclusionary rule is "prudential rather than constitutionally mandated" and is applicable "only where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. Of Probation and Parole v. Scott,* 524 U.S. 357, ___ (1998) *quoting United States v. Leon,* 468 U.S. 897, 907 (1984). On remand, the Ohio Supreme Court could conceivably find that under the circumstances of this case, where the agents acted in a good faith belief

that they were within their jurisdictional mandates, that the substantial social cost of allowing Mr. Droste to go free would outweigh the slight deterrent benefit.

Even if this Court finds that the applicability of the exclusionary rule is properly before it, another independent ground exists whereby the Petitioner's conviction would stand even if this Court were to find in his favor and apply the rule. The Ohio Supreme Court stated in its opinion that the mere providing to Officer Lagore of the information upon which he conducted his criminal investigation was not an exercise of the agents' police authority. (Petitioner's Appendix C, 15-16) Furthermore, under Ohio law:

> [A]n arrested person is not immune from prosecution merely because of the fact that his arrest was "unlawful" or "unauthorized."

Kettering v. Hollen, 64 Ohio St. 2d 232, 236 (1980) *citing Ohio v. Holbert,* 38 Ohio St. 2d. 113 (1974); *accord INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984); *Gerstein v. Pugh,* 420 U.S. 103 (1975); *Frisbie v. Collins,* 342 U.S. 519 (1952). Under the unique

circumstances of this case wherein the agents clearly had the authority to observe the Petitioner's driving, the officer had probable cause to detain and arrest the Petitioner, and Ohio law would not immunize the Petitioner from prosecution even if the exclusionary rule were applied, a ruling from this Court as to the application of the exclusionary rule would have no practical effect on the Petitioner's case.

As such, the desire to avoid advisory opinions and the conservation of scarce federal judicial resources would prescribe denial of the writ of certiorari.

II. The questions raised below are primarily questions of state law and not of national import, furthermore, the decision is in keeping with clearly established principals of law delineated by this Court.

On May 27, 1936, the Ohio Supreme Court specifically declined to adopt the exclusionary rule as a means by which to deter police misconduct. *Ohio v. Lindway,* 131 Ohio St. 166 (1936). Subsequent to the decision handed-down by this Honorable Court in

Mapp v. Ohio, 367 U.S. 643 (1961), the Ohio Supreme Court enunciated the policy that the exclusionary rule would apply only to violations of a constitutional nature. *Ohio v. Myers,* 26 Ohio St. 2d 190, 196 (1971). That ruling is still good law in Ohio. *Kettering v. Hollen,* 64 Ohio St. 2d 232 (1980).

When the Ohio Supreme Court agreed to hear the appeal in the instant case, it was done to correct the decisions of two wayward Appellate Courts who had strayed from the firmly established precedent in this area of law. While certainly of importance to Ohio jurisprudence, the decision is lacking in national application. The Ohio Supreme Court did not undertake to determine whether the exclusionary rule applies to a violation of federal law, but rather sought to reaffirm its policy that it does not apply to a mere violation of state law. Counter to the assertions of the Petitioner, this decision was not contrary to "every reported decision from other jurisdictions."[5] (Petition, 14).

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[5] *See, e.g., United States v. Hensel,* 699 F. 2d 18 (5th Cir. 1982); *United States v. Ware,* 161 F. 3d 414 (6th Cir. 1998); *United States v. Harrington,* 681 F.2d 612 (9th Cir. 1982); *United States v. Thompson,*

The Petitioner's attempt to imbue state law with constitutional import becomes all the more imprudent when viewed in light of the diversity of legislation throughout the states. To attach constitutional significance to what has previously been state statutory constraints would be to create a nation wherein not only are the laws different from state-to-state, but the rights afforded a citizen under the U.S. Constitution vary from state-to-state. To afford the states the power to alter the meaning of the U.S. Constitution in this manner would be to invite an erosion of both the protections of the Fourth and Fourteenth Amendments and the authority of this Honorable Court.

Furthermore, the Petitioner is also incorrect when he states that the decision of the Ohio Supreme Court is "in conflict with clearly established principals of law previously decided by this Honorable Court." (Petition, 14). In fact, this Court has determined not to

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936 F.2d 1249 (11th Cir. 1991); *United States v. Long*, 803 F. Supp. 1086 (D. S.C. 1992); *Daniels v. Alabama*, 534 So. 2d 628 (1985); *Colorado v. Fournier*, 793 P.2d 1176 (1990); *Louisiana v Matthieu*, 506 So. 2d 1209 (1987); *Michigan v. Clark*, 450 N.W.2d 75 (1989); *New York v. La Fontaine*, 664 N.Y.S.2d 587 (1997); *Tharp v. Virginia*, 270 S.E.2d 752 (1980).

apply the exclusionary rule under circumstances similar to those that the Petitioner alleges to have been unconstitutional in the instant case. This Court has observed that:

> [E]vidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Illinois v. Krull, 480 U.S. 340, 348-349 (1987) *citing United States v. Leon,* 468 U.S. 897 (1984) *quoting United States v. Peltier,* 422 U.S. 531, 542 (1975). Under this same rationale, this Honorable Court has declined to invoke the exclusionary rule where evidence was obtained in reasonable reliance on a search warrant later found to be unsupported by probable cause, *United States v. Leon,* 468 U.S. 897 (1984), evidence was obtained in reasonable reliance on a statute later declared unconstitutional, *Illinois v. Krull,* 480 U.S. 340 (1987), and evidence obtained in reasonable reliance on information received from a

court employee that was later found to be erroneous, *Arizona v. Evans*, 514 U.S. 1 (1995).[6]

For all the foregoing reasons, the petition should be denied.

III. Pertaining to the second "Question Presented for Review," the Court lacks jurisdiction to hear this issue.

The Petitioner invokes the jurisdiction of this Honorable Court pursuant to 28 USCS section 1257 which provides for review by the Supreme Court by writ of certiorari where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution ... of ... the United States." Furthermore, when reviewing state court judgments under 28 USCS section 1257, this Court has adhered to the view that a Petitioner's claim will not be considered "unless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson,*

[6] This Court has given constitutional import to Arkansas's "knock-and-announce" law, however, the basis for that decision lied in the Court's finding that the common law principle upon which the statute was based is a part of the reasonableness inquiry under the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

520 U.S. 83 (1997) *citing Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v Gates,* 462 U.S. 213, 217-219 (1983); *McGoldrick v. Compaignie Generale Transatlantique,* 309 U.S. 430, 434 (1940). Where the state court is silent on a federal question, the Court will assume that the issue was not properly presented. *Adams,* 520 U.S. at ___, *citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987). The burden of defeating this assumption lies with the Petitioner who bears the burden of demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented." *Webb v. Webb,* 451 U.S. 493 (1981). Rule 14(1)(g)(i) of the Rules of the Supreme Court makes it incumbent upon the Petitioner to specify the stage in the proceedings when the federal question sought to be reviewed was raised.

In addition to the requirements that the Petitioner raise a federal question which previously had been properly presented to the state court, the jurisdiction of this Court is further predicated upon a showing of "standing." A Petitioner must be able to

demonstrate "personal injury fairly traceable to the [respondent's] allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v Wright,* 468 U.S. 737, 750-751 (1984) *citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982).

While it succeeds in straining the bounds of credulity, the Petitioner's second "Question Presented for Review," fails to state a federal claim. Nor has the Petitioner met his burden in demonstrating that the state court had a fair opportunity to address any federal question that the Petitioner attempted to raise regarding the right of a citizen to use force to resist an unlawful arrest. The State submits that the reason for the Petitioner's omissions, in contravention of Rule 14(1)(g), lies in the fact that Mr. Droste neither used force to resist his arrest nor was alleged to have done so. In fact, the Petitioner concedes this fact in his "Petition for Writ of Certiorari." (Petition, 12)

The Petitioner's failure to allege that he used force to resist his arrest calls this Court's jurisdiction

into question on another level. While the State is moved by the concern demonstrated for the safety of law enforcement officers amid the "potential blood bath" hypothesized by the Petitioner, the Petitioner is, nonetheless, without standing to pose the question. The Petitioner has failed to demonstrate personal injury (in regards to this issue) as the result of the State's allegedly unlawful conduct. In fact, the Petitioner, in arguing the point, asserts that it is the State that has been harmed.

For all of the aforementioned reasons, the Respondent submits that this Honorable Court is without jurisdiction to hear the matters presented in the second "Question Presented for Review."

CONCLUSION

For the foregoing reasons, Respondent State of Ohio requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

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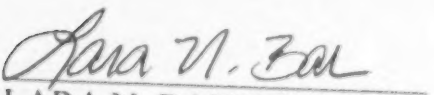
CITY PROSECUTOR



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APPENDIX

Ohio Revised Code section 5502.61 ..... A-1

Ohio Supreme Court Rules for the
Reporting of Opinions B-1

APPENDIX A

OHIO REVISED CODE

Section 5502.61 Liquor control investigators.

(A) As used in this section, "felony" has the same meaning as in section 109.511 [109.51.1] of the Revised Code.

(B)(1)(a) Any person employed by the director of public safety and designated by the director to enforce Title XLIII [43] of the Revised Code shall be known as a liquor control investigator and shall serve within the department's investigation unit. The director shall not employ a person as a liquor control investigator in the investigation unit engaged in the enforcement of Title XLIII [43] of the Revised Code on a permanent basis, on a temporary basis, for a probationary term, or on other than a permanent basis if the person previously has been convicted of or has pleaded guilty to a felony.

(2)(a) The director of public safety shall terminate the employment of a liquor control investigator in the investigation unit of the department engaged in the enforcement of Title XLIII [43] of the Revised Code if the liquor control investigator does either of the following:

(i) Pleads guilty to a felony;

(ii) Pleads guilty to a misdemeanor pursuant to a negotiated plea agreement as provided in division (D) of section 2929.29 of the Revised Code in which the liquor control investigator agrees to surrender the certificate awarded to that investigator under section 109.77 of the Revised Code.

(b) The director of public safety shall suspend from employment a liquor control investigator in the investigation unit of the department engaged in the enforcement of Title XLIII [43] of the Revised Code if the liquor control investigator is convicted, after trial, of a felony. If the liquor control investigator files an appeal from that conviction and the conviction is upheld by the highest court to which the appeal is taken or if the liquor control investigator does not file

a timely appeal, the director shall terminate the employment of that investigator. If the liquor control investigator files an appeal that results in that investigator's acquittal of the felony or conviction of a misdemeanor, or in the dismissal of the felony charge against that investigator, the director shall reinstate that investigator. A liquor control investigator who is reinstated under division (B)(2)(b) of this section shall not receive any back pay unless that investigator's conviction of the felony was reversed on appeal, or the felony charge was dismissed, because the court found insufficient evidence to convict that investigator of the felony.

(3) Division (B) of this section does not apply regarding an offense that was committed prior to January 1, 1997.

(4) The suspension from employment, or the termination of the employment, of a liquor control investigator under division (B)(2) of this section shall be in accordance with Chapter 119, of the Revised Code.

(C)(1) A liquor control investigator, on any retail liquor permit premises or any other premises where a violation of Title XLIII[43] of the Revised Code or any rule adopted under it is occurring, has the authority vested in peace officers under section 2935.03 of the Revised Code to keep the peace and to enforce and make arrests for those violations. A liquor control investigator may also execute search warrants and seize and take into custody any property relating to any of those violations.

(2) A liquor control investigator who is on, immediately adjacent to, or across from a retail liquor permit premises and is performing investigative duties relating to that premises or who is on a tract of land that is not a liquor permit premises but where violations of Title XLIII [43] of the Revised Code allegedly are occurring, or who is in view of a suspected violation of Title XLIII [43] of the Revised Code, has the authority to enforce that title and sections 2903.12, 2903.13, 2903.14, 2907.09, 2917.44, 2921.13, 2921.31, 2921.32, 2921.33, 2923.12, 2923.121 [2923.12.1], 2925.11, 2925.13, and 4507.30

of the Revised Code if the offense is witnessed during an investigation of or the enforcement of an offense described in Title XLIII [43] of the Revised Code. Nothing in this section shall be construed to supersede or curtail local law enforcement authority.

(3) Before exercising any powers of a peace officer as defined in section 2935.01 of the Revised Code, a liquor control investigator shall comply with the certification requirements of section 109.77 of the Revised Code, take an oath of office, and receive from the governor, upon the director of public safety's recommendation, a commission indicating authority to make arrests as authorized by this section.

(D) A liquor control investigator may render assistance to a state or local law enforcement officer at that officer's request or in an emergency. A liquor control investigator who renders assistance authorized by this division to a state or local law enforcement officer shall be considered as performing services within the scope of the investigator's regular employment.

A political subdivision that receives the assistance of a liquor control investigator under this division is not subject to civil liability under Chapter 2744, of the Revised Code as a result of any action or omission of the liquor agent.

(E) To achieve the purposes for which liquor control investigators are designated under this section, the director of public safety may enter into cooperative or contractual arrangements with the United States, any department or agency of the United States, other states, state agencies and political subdivisions of this state, or any other person or body politic to affect the enforcement of liquor control laws and alcohol education.

HISTORY: 146 v S 162 (Eff 10-29-95); 146 v H 566. Eff 10-16-96.

APPENDIX B

SUPREME COURT RULES FOR THE REPORTING OF OPINIONS

Effective March 1, 1983

RULE 1. Supreme Court Opinions

(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the test of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.